89-979

No.

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BAUSCH & LOMB INCORPORATED, a Corporation,
Petitioner,

VS.

HEWLETT-PACKARD COMPANY, a Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

RICHARD W. BUCKNER
O'MELVENY & MYERS

LAURENCE H. PRETTY
PRETTY, SCHROEDER,
BRUEGGEMAN & CLARK
444 South Flower Street
Suite 2000
Los Angeles, California 90017

JAMES W. COLBERT, III
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071
(213) 669-6000
Counsel of Record
for Petitioner
Bausch & Lomb
Incorporated

BERNARD D. BOGDON, Esq.
BAUSCH & LOMB INCORPORATED
One Lincoln First Square
Post Office Box 54
Rochester, New York 14601

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

QUESTION PRESENTED

Although the decision for which review is sought was rendered by the United States Court of Appeals for the Federal Circuit in a patent action, this petition for writ of certiorari raises no issue of patent law. Rather, it presents the following question of general applicability respecting the duties imposed upon judicial officers by the impartiality requirements of 28 U.S.C. § 455:

> **Does a trial judge possessed of facts known by him to be of relevance to his impartiality — in this instance, his son's employment by respondent Hewlett-Packard — have an obligation to disclose those facts to litigants engaged in a bench trial before him such that his deliberate withholding of that information creates an appearance of bias requiring his disqualification?**

PARTIES TO THE PROCEEDING BELOW

1. Hewlett-Packard Company ("Hewlett-Packard") — plaintiff and appellee below.

2. Bausch & Lomb Incorporated ("Bausch & Lomb") — defendant and appellant below.[1]

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[1]There are no parent, subsidiary or affiliate corporations required to be listed pursuant to Rule 28.1 of this Court.

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REPORT OF DECISION BELOW

The decision for which review is sought is reported as *Hewlett-Packard Company v. Bausch & Lomb Incorporated*, 882 F.2d 1556 (Fed. Cir 1989).

JURISDICTION

The decision for which review is sought was entered on August 9, 1989. A timely motion for rehearing was filed by petitioner Bausch & Lomb and denied by the Court of Appeals on October 6, 1989. This Court has jurisdiction to review the decision at issue by writ of certiorari pursuant to 28 U.S.C. §§ 1254 and 2101(c) and Rule 20 of the Rules of this Court.

STATUTE AT ISSUE

The statute at issue is subpart (a) of 28 U.S.C. § 455:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

STATEMENT OF THE CASE

This controversy exists because of the conscious decision of the trial judge below, the Hon. Robert P. Aguilar, not to reveal to Bausch & Lomb the fact that his son was a long-time employee of Hewlett-Packard, the other litigant before him. The eventual revelation of this employment relationship — after a bench trial and from sources other than Judge Aguilar — has led Bausch & Lomb to seek Judge Aguilar's disqualification at the district court, at the court of appeals and, by this petition, before this Court. For the litigants in this action, the issue presented is whether Judge Aguilar properly presided, and properly continues to preside,[2] over this action. For litigants generally, the issue is the meaningful enforcement of the safeguards against the risk of judicial bias.

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[2]As the Court is probably aware, the bulk of Judge Aguilar's calendar has been transferred to other judges in the Northern District of California by reason of Judge Aguilar's indictment and upcoming criminal trial. This action is one of the few that has not been so transferred. Accordingly, the issue of Judge Aguilar's continued participation has not been rendered moot by reason of his caseload reassignment. Bausch & Lomb's intent to file this petition has been discussed with Judge Aguilar who has stayed further proceedings before him until such time as this Court has acted on the petition.

As already noted, the substantive claims in this action arise under the patent laws of the United States, jurisdiction for which is invested in the district courts by 28 U.S.C. § 1338. This action was commenced in October 1984 as a suit for declaratory relief by Hewlett-Packard in its home district, the Northern District of California. (A 122-126.)[3] As relief, Hewlett-Packard sought a declaration that U.S. Patent No. Re. 31,684, owned by Bausch & Lomb, was invalid or, alternatively, that Hewlett-Packard's products did not infringe that patent.[4] Bausch & Lomb counterclaimed for patent infringement. (A. 131-141.) The action was eventually assigned to Judge Aguilar, as was a related action involving disputes over ownership of the patent at issue and a subsequent action commenced by Hewlett-Packard charging Bausch & Lomb with infringement of a different patent owned by Hewlett-Packard.

At the time this action was assigned to him, Judge Aguilar's son had been an employee of the Corvallis division of Hewlett-Packard for many years.[5] (A 277-79, 283-86.) Neither then nor at any later time did Judge Aguilar disclose to Bausch & Lomb this relationship

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[3]The reference is to the Joint Appendix constituting the record before the Federal Circuit. In keeping with the admonition of Rule 19.1, however, petitioner has not requested certification and transmission of that record at this time.

[4]The products at issue are "x-y plotters," electromechanical devices for producing graphs. The Hewlett-Packard plotters are the most successful on the market from a commercial standpoint, and the patent controversy is one of significant economic importance to both litigants.

[5]Judge Aguilar's son held a position as "Materials Handling Supervisor." It does not appear that he had any personal involvement with the Hewlett-Packard products at issue in this action.

between his son and Bausch & Lomb's litigation adversary. Nor did Hewlett-Packard disclose its employment of Judge Aguilar's son, a failing that Hewlett-Packard has since attributed to the fact that the personnel responsible for the litigation were themselves unaware that the judge's son was a Hewlett-Packard employee. (A 277-79, 283-86.) As a consequence, Bausch & Lomb remained ignorant of this potential source of bias throughout discovery and trial.

In April 1988, Judge Aguilar severed for separate trial one of Hewlett-Packard's affirmative defenses to the enforcement of Bausch & Lomb's patent, the "inequitable conduct" defense that accused Bausch & Lomb of failing to make adequate investigation of facts represented to the Patent and Trademark Office in connection with that office's consideration of a reissue proceeding seeking a modification of the patent several years after its issuance. (A 179-86.) This defense was presented in a seven-day bench trial before Judge Aguilar during which past and present Bausch & Lomb employees and agents accused of inequitable conduct gave testimony explaining and justifying the actions of which Hewlett-Packard complained. On May 18, 1988, Judge Aguilar entered judgment for Hewlett-Packard rejecting as not credible the explanations proffered by the Bausch & Lomb witnesses, sustaining Hewlett-Packard's defense in its entirety and rendering the draconian judgment that *both* the modifications obtained in the reissue proceeding *and* the original patent were unenforceable despite the lack of any nexus between the original patent and the alleged misconduct. (A 1, 187-266.)

Throughout these trial proceedings, Bausch & Lomb had remained unaware of the relationship between Hewlett-Packard and Judge Aguilar's son. On June 1, 1988,

however, Steven Fox, a Hewlett-Packard attorney assigned to this case, mentioned the litigation in the course of an internal seminar on patents. Thereupon, one of the Hewlett-Packard employees in attendance asked Mr. Fox if he was aware that Hewlett-Packard employed the judge's son. (A 277-79.) After verifying this information, Mr. Fox brought it to the attention of Hewlett-Packard's trial counsel, who, unlike Judge Aguilar, considered it their obligation to report this fact promptly to Bausch & Lomb's trial counsel. (A 329.)

Faced not merely with the employment relationship between Judge Aguilar's son and Hewlett-Packard, but also with Judge Aguilar's inexplicable failure to disclose that fact through nearly four years of hotly-contested litigation, Bausch & Lomb moved to disqualify Judge Aguilar pursuant to 28 U.S.C. § 455(a). (A 119.) At the hearing on this motion, Judge Aguilar confirmed that his failure to disclose his son's employment by Hewlett-Packard was the result of a deliberate choice and not oversight. Judge Aguilar stated that he was sensitive to the potential conflict created by his son's employment at Hewlett-Packard because it was a large and frequent litigator before his court and that he had frequent discussions with his son regarding his status at Hewlett-Packard because he "didn't want to have any problem regarding that." (A 344-45.) With respect to this litigation, Judge Aguilar stated that he had explored with his son the question of whether his son had any involvement with the products at issue and satisfied himself that he did not. Judge Aguilar thereupon concluded that his son's relationship to Hewlett-Packard was not disqualifying in this case. (A 345-46.) On the question of why he had failed to disclose any of the foregoing to Bausch & Lomb until after his son's employment was discovered and revealed by Hewlett-Packard's counsel, Judge Aguilar

stated that he found no obligation of disclosure in the law and that he did not want to put Hewlett-Packard opponents in the uncomfortable position of feeling coerced to waive any objections. (A 348.) On this reasoning, Judge Aguilar denied Bausch & Lomb's motion in its entirety.[6] (A 82-88.)

Bausch & Lomb appealed the adverse judgment to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1295(a)(1), seeking reversal both for errors of patent law in the decision rendered and for Judge Aguilar's refusal to recuse himself. The Federal Circuit reversed a portion of the judgment on the ground that the trial court had applied the wrong substantive standard to the evidence presented on the inequitable conduct defense and ordered the action remanded for further proceedings under the proper standard. The court of appeals affirmed Judge Aguilar's denial of the disqualification motion, however. Although it acknowledged the seriousness of the bias question raised by the employment of Judge Aguilar's son by Hewlett-Packard, the Federal Circuit rejected Bausch & Lomb's contention that Judge Aguilar's decision to withhold that fact gave rise to an appearance of bias. The Federal Circuit found no relevance in Judge Aguilar's failure to disclose his son's position, expressly holding that he had no obligation to do so:

> "Moreover, contrary to B&L's understanding, the trial judge was not required to disclose to B&L that the son was employed by HP. Counsels' (sic) ap-

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[6]Judge Aguilar also denied Bausch & Lomb's motion for disqualification in the then-untried infringement action brought by Hewlett-Packard on its own patent. After a bench trial, Judge Aguilar entered judgment for Hewlett-Packard in that action as well. An appeal therefrom is pending in the Federal Circuit.

proval to preside was unnecessary. Indeed, some authorities indicate that seeking such approval is inappropriate . . . ." 882 F.2d at 1569. (P.A.28)[7]

It is this holding — and the Federal Circuit's consequent affirmance of Judge Aguilar's denial of the disqualification motion — for which review is now sought.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE FEDERAL CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

In rejecting Bausch & Lomb's appeal on the disqualification issue, the Federal Circuit has shown itself to be untroubled by Judge Aguilar's deliberate concealment of his son's employment by Hewlett-Packard. The court of appeals expressly held that there was no duty on the trial judge's part to disclose such a source of bias to the litigants before him, and the language of the court's opinion quoted above recommends Judge Aguilar's secretive approach to all jurists faced with such questions. With all due respect to the court of appeals, the rule of law so announced is a pernicious one that is in conflict with the pronouncements of this Court and those of at least one other circuit.

To address intelligently the principle of law at issue, it is first necessary to uncouple the two concepts erroneously mated in the Federal Circuit's decision. In deciding that a trial judge has no duty to disclose potential sources of bias, the court of appeals relied upon the proposition that a judge does not need the consent of the litigants before him in order to proceed and should resolve ques-

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[7]The reference to "P.A." is to the Appendix to this Petition.

tions respecting his impartiality on his own without soliciting the views of the litigants' counsel.[8] But this reasoning equates the disclosing of facts pertinent to the question of bias with the soliciting of consent, and that equation is false.

The proposition that a trial judge should decide for himself the issue of his impartiality does not require, or even suggest, that he should keep secret the fact of his deliberations on that score or the circumstances that required him to address the issue. The distinction between disclosure and solicitation of consent is well-illustrated by the decision of the Court of Appeals for the Seventh Circuit in *Matter of National Union Fire Insurance Company of Pittsburgh,* 839 F.2d 1226 (7th Cir. 1988). There the Seventh Circuit, as the Federal Circuit here, pronounced itself of the view that "[j]udges should refrain from asking for the views of counsel on these questions [of bias]." 839 F.2d at 1231. Unlike the Federal Circuit, however, the Seventh Circuit recognized that it did not follow that a trial judge should conceal his deliberations from the litigants. Thus, in stark contrast to the secret deliberations commended by the Federal Circuit, the Seventh Circuit opined:

> "The best practice is to disclose the details that the judge deems significant, to make a decision by one's own lights, and let counsel speak or keep silence as they will." 839 F.2d at 1231.

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[8]The court of appeals relied heavily on Resolution L of the Judicial Conference of the United States, adopted Oct. 1971. 882 F.2d at 1569. This resolution preceded the 1974 amendment to section 455 substituting an objective standard on bias in lieu of the former subjective test and is, therefore, of uncertain status today. For the reasons discussed in text, however, the principle enunciated in this resolution is of no relevance in any event.

In this conflict over the appropriate procedure to follow in resolving issues of bias, it is the Seventh Circuit and not the Federal Circuit that is in the mainstream. Indeed, the Federal Circuit finds itself in conflict with the views expressed by this Court itself. In that regard, this Court emphasized the importance and desirability of disclosure of possible sources of bias in a decision rendered only last year. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988). In discussing the advisability of the remedy fashioned by the court of appeals in that case — vacation of the judgment entered by a trial judge subsequently disqualified — this Court noted approvingly that the approach taken by the court of appeals "may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification *and to promptly disclose them when discovered.*" 486 U.S. at ____, 100 L. Ed. 2d at 877, 108 S. Ct. at 2206 (emphasis added).

B. THE DISCLOSURE PRINCIPLE AT ISSUE IS A MATTER OF CRITICAL IMPORTANCE TO PUBLIC PERCEPTION OF THE INTEGRITY OF THE JUDICIAL PROCESS.

The pendency of bills S.765 and H.R. 2337, proposing that the judiciary be subject to the conflicts provisions of 18 U.S.C. §§ 208 and 209, is ample testament to the importance of sustaining public confidence in the integrity of the judicial process. If maintenance of that public confidence requires that judicial negligence be discouraged — as this Court concluded in *Liljeberg* — those same considerations require that conscious concealment be prohibited altogether. Indeed, it takes only a moment's reflection to recognize that concealment by a trial judge of sources of bias bearing on his ability to weigh that

evidence impartially is entirely antithetical to the most fundamental principles underlying our system of justice.

It states the obvious to observe that disputes before our trial courts are resolved on the basis of the evidence in the record, with an opportunity for full participation by the contesting parties and subject to the safeguard of review by an appellate tribunal. We would not tolerate a procedure that permitted a litigant's rights to be determined on the basis of evidence never disclosed to him, and upon which he was never allowed to comment, by a trial judge who never had to explain his reasoning or subject his views to appellate review. Yet such is precisely the procedure adopted by Judge Aguilar and blessed by the Federal Circuit. If a trial judge may keep secret the existence of a source of bias and resolve for himself the effect of that circumstance on his impartiality without revealing the fact that an issue exists on that score to the litigants who have entrusted to him the dispassionate weighing of the evidence, we have seriously eroded our adversary system of justice. What is not known cannot be discussed, challenged or reviewed; and the enforcement of 28 U.S.C. § 455 will have been assigned to the Star Chamber.

It can hardly be clearer that Congress intended no such result. One of the principal changes to the standards of judicial conduct effected by the 1974 amendments to Section 455 was the elimination of the oft-criticized subjective standard of the old law, requiring a judge to recuse himself only when "in his opinion" it was improper for him to continue to sit, and the substitution of an objective standard, requiring recusal whenever "his impartiality might reasonably be questioned." As explained by the House Report on this legislation, adoption of this objective standard "is designed to promote public confi-

dence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." H.R. 93-1453, 1974 U.S. Code Cong. and Admin. News 6351, 6355. It is hardly consistent with the adoption of an objective standard to relegate its enforcement to the secret and subjective proceeding countenanced by the Federal Circuit. Nor is the withholding of information bearing on impartiality likely to promote public confidence, as Congress intended. To the contrary, it is the common human experience — well-illustrated by numerous political scandals over the past two decades — that there is no fact so sinister as one that is concealed.

Rejection of the Federal Circuit's view that there was no obligation on Judge Aguilar's part to disclose his son's employment with Hewlett-Packard necessarily requires, under the facts of this case, that Judge Aguilar be disqualified. As the Federal Circuit itself acknowledged, the circumstance at issue here — the employment of his son by one of the litigants — is well-recognized as presenting a serious question for disqualification under section 455(a). Far more attenuated connections between a judge's relative and a litigant have appeared to some jurists to require disqualification under the objective standard of the appearance of bias. *See Goldberg v. Goldstone,* CCH Copyright Law Reporter P 25, 203 (S.D.N.Y. 1980) (judge's daughter had been employed by party, Doubleday, as a receptionist and a reader "for about a year"); *SEC Investor Protection Corp. v. Bell and Beckwith,* 28 B.R. 285 (Bkcy Ct. N.D. Ohio 1983) (judge's nephew and nephew's spouse were customers of defendant). The critical reaction of responsible elements of the press to Judge Aguilar's decision to continue to sit despite his son's employment by Hewlett-Packard is fur-

ther testament to the serious nature of the threat to public perception of the judiciary that is created by such a relationship. *E.g., Wall Street Journal,* August 3, 1988 ("Judge Won't Step Down in Hewlett Case, Even Though Son Works For Company"); *New York Times,* August 8, 1988 ("Impartial Judges: A Growing Issue"). Finally, as already noted, Judge Aguilar has conceded that he fully understood the sensitive nature of the potential conflict of interest created by his son's position at Hewlett-Packard.

The withholding of information of such unquestioned pertinence was an extraordinary act that, regardless of the judge's subjective rationalization, is hardly conducive to public confidence in the judiciary. Judge Aguilar was presiding at a bench trial where he was called upon to judge the credibility of the witnesses presented by the parties, a circumstance that heightens the sensitivity of bias issues. Despite that fact, Judge Aguilar displayed less candor than Bausch & Lomb's opponent in this litigation, whose counsel expressly acknowledged that concealment on *their* part would create an appearance of impropriety and conceded that "our obligation was to disclose the matter and clear the air." (A 329.) Judge Aguilar chose a lower road, creating the singular and unfortunate image of a jurist who has himself been less than candid sitting in judgment on the candor of others. This is not the image of the administration of justice that

Congress contemplated in enacting the provisions of 28 U.S.C. § 455.

DATED: December 18, 1989

O'MELVENY & MYERS
JAMES W. COLBERT, III

By _____
James W. Colbert, III
Counsel of Record
for Petitioner
Bausch & Lomb Incorporated

Of Counsel:
Richard W. Buckner
O'Melveny & Myers

Laurence H. Pretty
Pretty, Schroeder, Brueggeman & Clark

Bernard D. Bogdon
Bausch & Lomb Incorporated

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On December 19, 1989, I served the within Petition for Writ of Certiorari in re: "Bausch & Lomb Inc. v. Hewlett-Packard Co." in the United States Supreme Court, October Term, 1989, No. ...., appendix filed under separate cover, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

S. Leslie Misrock
Jonathan A. Marshall
Pennie & Edmonds
1155 Avenue of the Americas
New York, New York 10036 + 3 appendix

James P. Kleinberg
McCutchen, Doyle, Brown & Enersen
55 South Market Street
San Jose, California 95113 + 3 appendix

William H. MacAllister
Hewlett-Packard Company
3000 Hanover Street
Palo Alto, California 94303 + 3 appendix

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 19, 1989, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA